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UNIVERSITY OF COLORADO v. DERDEYN: THE CONSTITUTIONALITY OF RANDOM, SUSPICIONLESS URINALYSIS DRUG-TESTING OF COLLEGE ATHLETES

By the time they have made the pros, most athletes have been given so many pills, salves, injections and potions, by amateur and pro coaches, doctors and trainers, to pick them up, cool them out, kill pain, enhance performance, reduce inflammation and erase anxiety, that there isn't much they won't sniff, spread, stick in or swallow to get bigger or smaller, or to feel goooooo.

- Robert Lipsyte¹

I. INTRODUCTION

Drug-testing in athletics became one of the most publicized topics of the 1980s.² Drug-testing has often been the subject of negotiation, arbitration, legislation and litigation.³ The complexity and confusion over drug-testing results from numerous standards, rules and findings which differ depending on the sport.⁴

1. JONATHAN HARRIS, DRUGGED ATHLETES: THE CRISIS IN AMERICAN SPORTS 1 (1987) (citing Robert Lipsyte, *Baseball and Drugs*, THE NATION, May 25, 1985).

2. GARY A. WADLER & BRIAN HAINLINE, DRUGS AND THE ATHLETE 196 (1989) (citing D.L. Breo, *MDs Call For Mandatory Drug Tests*, AM. MED. NEWS, Mar. 14, 1986, at 25; J.V. Lamar, Jr., *Scoring Off the Field*, TIME, Aug. 25, 1986, at 52; M. Rust, *Drug Deaths Heat Up Testing Debate*, AM. MED. NEWS, July 18, 1986, at 1; M. Topol, *Drug Testing Gaining Foothold*, NEWSDAY, July 9, 1985; C. Wolff, *Bosworth Barred from Bowl for Steroids*, N.Y. TIMES, Dec. 26, 1986).

3. *Id.* (citing ACLU Files Lawsuit On Drug Testing, NEWSDAY, Jan. 7, 1987; W.J. Curran, *Compulsory Drug Testing: The Legal Barriers*, 316 NEW ENG. J. MED. 318 (1987); *Drug Plan Challenged*, N.Y. TIMES, Oct. 22, 1986; *Drug Test Lost By Jockeys*, NEWSDAY, Dec. 2, 1986; D.M. Gianelli, *Drug Testing Programs Face Legal Challenge*, AM. MED. NEWS, Dec. 12, 1986; P. Keir, *Drug Tests Losing Most Court Cases*, N.Y. TIMES, Dec. 11, 1986; M. Nobel, *Drug Tests Are In Violation*, NEWSDAY, July 31, 1986; *Rozelle's Plan For Unscheduled Drug Testing Over-Turned*, N.Y. TIMES, Oct. 26, 1986; M. Rust, *County May Bar Most Drug Testing*, AM. MED. NEWS, Sept. 12, 1986; *Steroid Ruling Upheld*, N.Y. TIMES, Jan. 1, 1987; *Time Right To Resolve Plan For Drug Testing*, NEWSDAY, June 22, 1986).

4. *Id.* (citing M. Duda, *Drug Testing in Professional Sports*, 13 THE PHYSICIAN AND SPORTSMEDICINE 46 (1985); M. Duda, *Drug Testing Challenges Colleges and Pro Athletes*, 12 THE PHYSICIAN AND SPORTSMEDICINE 109 (1984); *A Matter of Policy*, NEWSDAY, July 11, 1986; *Drug Ban For 15 Pentathletes*, NEWSDAY, Nov. 25, 1986; *Drug Testing For Tennis Pros*, N.Y. TIMES, Nov. 7, 1985; M. Goodwin, *Should Baseball Have Mandatory Drug Testing?*, N.Y. TIMES, Nov. 13, 1985; *IAAF To Expand Drug-Testing Rules*, N.Y. TIMES, Aug. 25, 1987; P. King, *The NFL Drug Plan*, NEWSDAY, July 8, 1986; *Marathon Drug Test*, NEWSDAY, Oct. 17, 1986; *Marathoner's Drug Test Positive*, Friends Say, NEWS-

In 1986, the National Collegiate Athletic Association (NCAA) implemented a drug-testing program.⁵ Subsequently, many of the universities that were members of the NCAA implemented their own drug-testing programs.⁶ Originally, the purpose of such testing programs was to eliminate any competitive advantage an athlete may obtain due to drug use.⁷ Due to "recreational" drug abuse among athletes, the rationale behind drug-testing has been expanded to include: "casefinding of individuals with a drug problem; screening teams or groups of athletes for evidence of drug abuse; protecting other athletes from injury caused by the drug-abusing athlete; enhancing the role model perception of athletes; deterring drug abuse by athletes; and minimizing criminality."⁸

Urinalysis drug-testing, which is conducted by the NCAA and a number of universities across the country, clearly constitutes a search for Fourth Amendment purposes.⁹ The student athlete has a valid expectation of privacy which is violated in two respects.¹⁰ First, an individual has a privacy right in the confidentiality of his medical records.¹¹ Disclosure of test results without authorization violates the privacy right of an individual.¹² Second, the student

DAY, July 14, 1986; P. Monahan, *Golden Gloves-Drug Testing Now Required*, N.Y. DAILY NEWS, Dec. 30, 1986; *O.K. of Riders' Drug Tests in New Jersey May Set Precedent*, NEWS-DAY, July 14, 1986; J. Pricci, *Drug Issue Still Cloudy*, NEWS-DAY, Dec. 14, 1986; G. Vecsey, *After Race, Testing Starts*, N.Y. TIMES, Nov. 3, 1986).

5. C. Claude Teagarden, *Suspicionless Punitive Urinalysis Testing of College and University Student-Athletes*, 65 EDUC. L. REP. 999, 1000 (1991). The NCAA originally tested student athletes at 73 championship events and 18 post-season football bowl games. *Id.* The drug-testing program produced interesting results. During the 1986-87 academic year, for example, 34 out of 3,360 student athletes tested positive for drug usage, in particular the use of anabolic steroids. *Id.* In the Fall 1987-88 championship season, 1.3% of the 1,589 student athletes tested positive, while during the 1988-89 season, only .8% out of 3,700 student athletes tested positive for drugs. *Id.* The NCAA's drug-testing program revealed that fewer student athletes tested positive than the NCAA had originally expected. *Id.* In 1989, the NCAA Executive Director, Richard D. Schultz, indicated that year-round testing must begin, because only the "dumb ones" were being caught. *Id.*

6. Stephen F. Brock, Kevin M. McKenna & Rhett Traband, *Drug Testing College Athletes: NCAA Does Thy Cup Runneth Over?*, 97 W. VA. L. REV. 53, 57 (1994).

7. WADLER & HAINLINE, *supra* note 2, at 197.

8. *Id.*

9. Teagarden, *supra* note 5, at 1011 (citing *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986); *O'Halloran v. University of Washington*, 679 F. Supp. 997, 1003 (W.D. Wash. 1988)).

10. Charles Feeney Knapp, *Drug Testing and the Student-Athlete: Meeting the Constitutional Challenge*, 76 IOWA L. REV. 107, 133 (1990). The athlete's expectation of privacy extends to the medical information yielded by the urinalysis as well as the very act of urination. Teagarden, *supra* note 5, at 1011.

11. *Id.* Knapp, *supra* note 10, at 133.

12. *Id.*

athlete's right to privacy is also violated if the state institution's interests do not outweigh the student athlete's privacy concerns.¹³

In the Fall of 1984, the University of Colorado (CU) began a drug-testing program for its intercollegiate student athletes.¹⁴ Although it has been amended several times,¹⁵ the program has always prohibited students from participating in intercollegiate athletics if they did not sign a form consenting to random urinalysis drug-testing.¹⁶ When CU student athletes challenged the constitutionality of the program, the trial court concluded that without individualized suspicion,¹⁷ CU's drug-testing program violates the Fourth Amendment's guarantee that "persons shall be secure against unreasonable searches and seizures conducted by the government."¹⁸ The Colorado Court of Appeals essentially affirmed the trial court's opinion.¹⁹ Subsequently, the Supreme Court of Colorado affirmed the appellate court's opinion.²⁰

This Note will initially describe the facts upon which the *Derdeyn* case developed. The Note will then establish the background which is necessary to fully analyze the legal issues in the case. Next, the Note will examine and critique the Supreme Court of Colorado's analysis of the Fourth Amendment implications of

13. *Id.*

14. *University of Colo. v. Derdeyn*, 863 P.2d 929, 930 (Colo. 1993).

15. For a discussion of CU's drug-testing program, as well as the various amendments, see *infra* notes 22-43 and accompanying text.

16. *Derdeyn*, 863 P.2d at 930.

17. The trial court stated that urinalysis drug-testing can only be conducted with probable cause, which is required under the Fourth Amendment. *Derdeyn*, 863 P.2d at 934. According to the trial court, reasonable suspicion is not sufficient to conduct urinalysis drug-testing. *Id.*

The terms "probable cause" and "reasonable suspicion" are difficult to define with precision. See Teagarden, *supra* note 5, at 1015 (stating the "reasonable suspicion" standard lacks precision and clarity). "Probable cause" can be defined as "[a] set of probabilities grounded in the factual and practical considerations which govern the decisions of reasonable and prudent persons and is more than mere suspicion but less than the quantum of evidence required for conviction." BLACK'S LAW DICTIONARY 1201 (6th ed. 1990) (citing *United States v. Riemer*, 392 F. Supp. 1291, 1294 (S.D. Ohio 1975)). The holding of the trial court indicates that probable cause is a stronger standard than reasonable suspicion. *Derdeyn*, 863 P.2d at 934.

18. *Id.* at 934. For a brief discussion of the Fourth Amendment, see *infra* notes 45-51 and accompanying text.

19. *Derdeyn v. University of Colo.*, 832 P.2d 1031 (Colo. Ct. App. 1991). The court of appeals, however, indicated that reasonable suspicion could be used in some instances for mandatory drug-testing of intercollegiate athletes at CU. *Id.* at 1035.

20. *Derdeyn*, 863 P.2d at 950. For a full discussion of the majority opinion of the Supreme Court of Colorado, see *infra* notes 72-124 and accompanying text.

For a discussion of the dissenting opinions, see *infra* notes 125-146 and accompanying text.

CU's random, suspicionless urinalysis drug-testing. Finally, this Note will discuss the impact of the Supreme Court of Colorado's decision.

II. FACTS

In the Fall of 1984, CU instituted a drug-testing program for its intercollegiate student athletes.²¹ Although the program has undergone numerous changes, the program has always been mandatory for all the university's athletes.²²

CU amended its drug-testing program on three separate occasions. Initially, in 1984, the program required urine tests for certain proscribed drugs at each intercollegiate athlete's annual physical, in addition to subsequent random urine tests.²³ Under the first version of the drug-testing program, if the test indicated a positive result, counseling was mandatory.²⁴ After a second positive result, the athlete was suspended from intercollegiate athletics for seven days.²⁵ If the athlete tested positive a third time, the athlete received at minimum, a one-year suspension.²⁶ The first and second amendments to the program, which underwent annual review, added more stringent penalties.²⁷

CU conducted its drug-testing program by subjecting its student athletes to a urinalysis, which is one of the most common methods used for drug-testing.²⁸ Originally, the student athletes

21. *Derdeyn*, 863 P.2d at 930.

22. *Id.* If an athlete did not consent to the random drug testing, CU prohibited the athlete from participating in intercollegiate athletics. *Id.* Despite the changes in the drug testing program, CU has always made the drug tests mandatory. *Derdeyn*, 863 P.2d at 930 n.3.

23. *Id.* Drugs proscribed by CU included amphetamines, barbiturates, cocaine, methaqualudes, opiates, morphine, codeine, PCP (angel dust) and analogues and tetrahydrocannabinol (THC or marijuana). *Id.* at n.4. The third amendment to the program added alcohol, over-the-counter drugs and performance enhancing substances such as anabolic steroids to the list of drugs for which the athlete could be tested. *Id.* at 932.

24. *Id.*

25. *Id.* at 930-31.

26. *Derdeyn*, 863 P.2d at 931.

27. *Id.* The first amendment increased the penalty for the first positive result to suspension for the current competitive season. The second penalty increased to permanent suspension from any CU athletics. *Id.* In addition, following the first positive result, CU required the athlete to successfully complete a drug rehabilitation program prior to further participation in CU athletics. *Id.* The second amendment to the program increased the suspension for the first positive result to a 12 month suspension. *Id.*

28. "[A] urinalysis was performed only after a finding of reasonable suspicion that an athlete has used drugs and at the athlete's annual physical examination." *Id.* at 932.

were not monitored during the act of urination.²⁹ The first amendment to the program changed this procedure by requiring that the "collection of the specimen will be observed, and the athlete will be asked to disrobe in order to protect the integrity of the testing procedure."³⁰ The third amendment to the program altered this practice by requiring only aural monitoring.³¹

Under the 1984 program, all test results were automatically sent to the team physician.³² The student athlete must have previously consented to the release of test results to the head athletic trainer at CU, parents or guardians or spouse, the head coach, the athletic director and the drug counseling program at the Wardenburg Student Health Center.³³ CU's program made no specific or general assurances of confidentiality.³⁴ While the first and third amendments to the program made relatively minor changes regarding the communication of test results to third parties,³⁵ none of these variations gave any confidentiality assurances.³⁶

The third amendment to the program contained some provisions which were not part of previous variations. The third amendment defined "athlete" more expansively, referring to athletes as: "all student participants in recognized intercollegiate sports, including but not limited to student athletes, cheerleaders, student trainers and student managers."³⁷ This amendment also substituted "rapid eye examinations" (REE) for the random urinalysis drug-testing.³⁸ If a student did not perform well on the REE, or exhibited physical or behavioral characteristics indicating drug abuse,

29. *Id.*

30. *Id.*

31. *Id.* at 932. Under this procedure, the sample was collected within the athletic department facilities in a private and enclosed area with a monitor outside. *Id.*

32. *Derdeyn*, 863 P.2d at 931.

33. *Id.* The campus' health services are based at the Wardenburg Student Health Center.

34. *Id.*

35. The first amendment still required the test results to be sent to the team physician, but upon a positive result, the team physician was to inform the head athletic trainer, who was then to notify the head coach. *Id.* In addition, an athlete with a positive drug test result had to participate in a phone call with his/her parents or guardians. *Id.* The third amendment continued to require the athlete to consent to the release of the test results as in the original program. *Id.* at 932. However, the third amendment did specify that the communications between an athlete and the Wardenburg Student Health Center would be confidential. *Id.*

36. *See id.* at 931-32.

37. *Derdeyn*, 863 P.2d at 932.

38. *Id.*

reasonable suspicion of drug use existed, and the student athlete was required to take a urine test.³⁹

In October of 1986, intercollegiate student athletes at CU filed a class action suit "challenging the constitutionality of the drug-testing program as it then existed and seeking declaratory and injunctive relief."⁴⁰ The Supreme Court of Colorado held that "in the absence of voluntary consents, CU's random, suspicionless urinalysis drug-testing of student athletes violates the Fourth Amendment to the United States Constitution and Article II, Section 7, of the Colorado Constitution."⁴¹ The court also held that the record supports the trial court's findings that "CU failed to show that consents to such testing given by CU's athletes are voluntary for the purposes of those same constitutional provisions."⁴² The court thus affirmed the trial court's decision to permanently enjoin CU from continuing the drug-testing program.⁴³

III. BACKGROUND

The central issue in *Derdeyn* is whether CU violated the Fourth Amendment to the United States Constitution and Article II, Section 7, of the Colorado Constitution by conducting random, suspicionless urinalysis drug-testing of student athletes in the absence of voluntary consents.⁴⁴ In order to properly analyze the *Derdeyn* hold-

39. *Id.* Behavioral characteristics that were considered indications of reasonable suspicion for drug abuse included: tardiness, absenteeism, poor health habits, emotional swings, unexplained performance changes and/or excessive aggressiveness. *Id.*

40. *Id.* The class consisted of "those present and prospective student athletes who are or will be subject to the University of Colorado intercollegiate athletic department's drug education program as a condition of participation in the University of Colorado intercollegiate athletic program." *Id.* at 933 n.9.

The allegations within the plaintiffs' complaint indicate that the then-existing program was the first amended program. *Id.* at 933 n.10. That program required students to be directly observed during the act of urination, while the penalty for the first positive test result included suspension for the current competitive season. *Id.*

The defendants have previously "refused to agree that they will not return to the policy which was initially challenged in this class action." *Id.* at 933. Thus, the trial court concluded that "the legality of CU's prior drug testing is not moot." *Id.*

41. *Id.* at 930. For a brief discussion of the Fourth Amendment, see *infra* notes 44-51 and accompanying text.

42. *Id.*

43. *Id.*

44. *Derdeyn*, 863 P.2d at 930. For a brief discussion of the Fourth Amendment, see *infra* note 45-51 and accompanying text.

In analyzing *Derdeyn*, it is sufficient to scrutinize the random, suspicionless urinalysis drug-testing according to the Fourth Amendment, as opposed to Article II, Section 7 of the Colorado Constitution, since the Colorado Constitution provides slightly more protection than the wording of its federal counterpart. People

ing, there must be a thorough understanding of the scope of the Fourth Amendment and its application.

A. The Fourth Amendment of the United States Constitution

The Fourth Amendment provides that "the right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause."⁴⁵ The Supreme Court has interpreted this language to mean that a search conducted by an agent of the state must be supported by a warrant issued upon probable cause.⁴⁶ If the search in question involves a special governmental need beyond the normal need for law enforcement, a warrant or probable cause requirement may hinder the objective of the search and, therefore, courts may substitute their own balancing tests.⁴⁷ Generally, the balancing test employed by a court consists of weighing the intru-

v. Oates, 698 P.2d 811, 815 (Colo. 1985). If a search is illegal under the United States Constitution, it is necessarily illegal under the Colorado Constitution.

45. U.S. CONST. amend. IV.

46. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989) (citing Griffin v. Wisconsin, 483 U.S. 868, 873 (1987); United States v. Karo, 468 U.S. 705, 717 (1984)).

Courts have generally recognized three instances when a search may be conducted without a warrant issued upon probable cause. State v. Shane, 255 N.W.2d 324, 325 (Iowa 1977) (citing State v. Jackson, 210 N.W.2d 537, 539 (Iowa 1973)). These exceptions include searches which are: (1) incident to a lawful arrest; (2) preceded by an informed and voluntary consent; and (3) conducted under exigent circumstances. *Id.*

47. *Von Raab*, 489 U.S. at 665-66. In *Derdeyn*, the special governmental needs which would be hampered by a warrant or probable cause requirement were: the need to protect the health and safety of intercollegiate student athletes, to prevent drug use by other students who look to the student athletes as role models, to maintain the integrity of its athletic program and to promote fair competition. *Derdeyn*, 863 P.2d at 945-46, 945 n.30.

The Supreme Court has recognized that the government's interest in dispensing with the warrant requirement is heightened when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara v. Municipal Ct. of San Francisco*, 387 U.S. 523, 533 (1967). Alcohol and other drugs are constantly being eliminated from the bloodstream. *See* 49 Fed. Reg. 24,291 (1984). Thus, blood and breath samples must be obtained as soon as possible to measure whether these substances were in the bloodstream at a certain time or event. *See Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (holding officer was permitted to withdraw blood from defendant to prevent destruction of evidence). Organizations such as railroads, hospitals and schools are not familiar with the warrant procedures of Fourth Amendment jurisprudence, thereby resulting in further delay if warrant requirements were imposed. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 623 (1989) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 339-40 (1985); *O'Connor v. Ortega*, 480 U.S. 709, 722 (1987)).

sion on the individual's Fourth Amendment interests against the promotion of the government interests involved.⁴⁸

A warrantless search is permissible when the individual has voluntarily consented to such a search.⁴⁹ In order to determine whether consent has been voluntarily given, consent must be "intelligently and freely given, without any duress, coercion or subtle promises or threats calculated to flaw the free and unconstrained nature of the decision."⁵⁰ This determination is a question of fact determined from "the totality of the circumstances."⁵¹

A form of coercion invalidating the finding of consent is the doctrine of unconstitutional conditions. This doctrine provides that "on at least some occasions, receipt of a benefit to which someone has no constitutional entitlement does not justify making that person abandon some right guaranteed under the Constitution."⁵² Otherwise, "if the government could deny a benefit to a person because of his [exercise of] constitutionally protected [rights], his exercise of those freedoms would in effect be penalized and inhibited."⁵³

48. See *Skinner*, 489 U.S. at 619 (citing *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)).

49. "A warrantless search of an individual is generally reasonable under the Fourth Amendment if the individual has voluntarily consented to it." *University of Colo. v. Derdeyn*, 863 P.2d 929, 946 (Colo. 1993) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 222 (1973)).

50. *People v. Carlson*, 677 P.2d 310, 318 (Colo. 1984).

51. *Id.* See also, *Derdeyn*, 863 P.2d at 946 (stating that "[a] warrantless search of an individual is generally reasonable under the Fourth Amendment if the individual has voluntarily consented to it").

52. *Derdeyn*, 863 P.2d at 953-54 (quoting Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, *The Supreme Court 1987 Term*, 102 HARV. L. REV. 5, 6-7 (1988)).

53. *Id.* at 947 (citing *Perry v. Sinderman*, 408 U.S. 583, 597 (1972)).

There are a number of cases in which courts have held that consent is not voluntarily given due to the doctrine of unconstitutional conditions. See *Bostic v. McClendon*, 650 F. Supp. 245 (N.D. Ga. 1986) (holding consent by city clerk's office and police personnel to urinalysis testing not voluntary where employment would have been terminated if personnel refused participation); *Feliciano v. City of Cleveland*, 661 F. Supp. 578 (N.D. Ohio 1987) (indicating that consent to urinalysis testing by police academy cadets was not voluntary where cadets believed such testing was essential to their jobs); *American Fed'n of Gov't. Employees v. Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1986) (ruling that consent to mandatory Department of Defense urinalysis testing was not voluntary since such consent was condition to maintaining job); *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309 (7th Cir. 1988) (holding that high school students cannot give valid consent to random drug-testing if it is condition for participation in interscholastic athletics).

B. Applying the Fourth Amendment to Random, Suspicionless, Urinalysis Drug-Testing

In order for the Fourth Amendment to apply to random, suspicionless urinalysis drug-testing, such testing must first be deemed a "search."⁵⁴ The Supreme Court has stated that the "Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment."⁵⁵

The administrator conducting the test must additionally be acting on the government's behalf in order to implicate the Fourth Amendment.⁵⁶ A number of federal courts have held that Fourth Amendment protection extends to student athletes in athletic programs of state schools or universities.⁵⁷ The Fourth Amendment has thus protected individuals from unreasonable searches even when the government acts as the administrator of an athletic program in a state school or university.⁵⁸

In cases where no search warrant or probable cause exists, a number of circuit courts have used a balancing test to determine whether random, suspicionless drug-testing is reasonable under certain circumstances. While several courts have upheld such testing,⁵⁹ many others have rejected such testing.⁶⁰

54. See U.S. CONST. amend. IV.

55. *Skinner*, 489 U.S. at 617. "[I]t is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, . . . these intrusions must be deemed searches under the Fourth Amendment." *Id.* (citing *Everett v. Napper*, 833 F.2d 1507, 1511 (11th Cir. 1987); *Von Raab*, 816 F.2d at 176, *aff'd in part, vacated in part*, 489 U.S. 656 (1989); *McDonnell v. Hunter*, 809 F.2d 1302, 1307 (8th Cir. 1987)).

56. See *Von Raab*, 489 U.S. at 665. "Our earlier cases have settled that the Fourth Amendment protects individuals from unreasonable searches conducted by the government . . ." *Id.*

57. See *Schail*, 864 F.2d 1309; *Brooks v. East Chambers Consol. Indep. Sch. Dist.*, 730 F. Supp. 759 (S.D. Tex. 1989).

58. *Derdeyn*, 863 P.2d at 935-36.

59. See, e.g., *International Bhd. of Teamsters v. Department of Transp.*, 932 F.2d 1292, 1304 (9th Cir. 1991) (describing bus or commercial truck drivers who operate "enormous" trucks such that "a single mistake in judgment or momentary lapse in attention can have devastating consequences for other travelers"); *Thomson v. Marsh*, 884 F.2d 113, 114 (4th Cir. 1989) (describing civilian employees of chemical weapons plant with access to areas where experiments are performed with highly lethal chemical warfare agents); *Jones v. Jenkins*, 878 F.2d 1476, 1477 (D.C. Cir. 1989) (describing drivers, mechanics and attendants whose primary duty is daily transportation of handicapped children on school buses); *Taylor v. O'Grady*, 888 F.2d 1189, 1199 (7th Cir. 1989) (describing county correctional employees with regular access to prisoners or weapons). Random, suspicionless testing was upheld in a variety of different circumstances.

60. There are a number of cases in which random, suspicionless drug testing was found unconstitutional. See, e.g., *Taylor*, 888 F.2d at 1201 (describing county

C. The Supreme Court's Analysis of Random, Suspicionless Drug-Testing

The Supreme Court decided the constitutionality of random, suspicionless urinalysis drug-testing in two key cases. The first case, *Skinner v. Railway Labor Executives' Association*,⁶¹ employed a balancing test whereby the Court gauged the reasonableness of the search by weighing the privacy interests of the individual against the government interests at stake.⁶² While conducting the balancing test, the Court determined that the government had a compelling interest in conducting suspicionless testing of railroad employees involved in certain types of train accidents.⁶³ The Court also determined that such employees "had diminished expectations of privacy for the purposes of the Fourth Amendment because they participated in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees."⁶⁴ The Court concluded that the gov-

correctional employees with no regular access to prisoners, no reasonable opportunity to smuggle narcotics to prisoners and no access to firearms); *National Fed'n of Fed. Employees v. Cheney*, 884 F.2d 603, 613 (D.C. Cir. 1989) (describing civilian laboratory workers at Army's forensic drug testing laboratories); *Harmon v. Thornburgh*, 878 F.2d 484, 496 (D.C. Cir. 1989) (describing United States Department of Justice employees, including prosecutors in criminal cases, who have access to grand jury proceedings).

61. 489 U.S. 602 (1989). In *Skinner*, evidence was presented which indicated that railroad employee alcohol and drug abuse had contributed to many serious train accidents. *Id.* A 1979 study indicated that roughly "one out of every eight railroad workers drank at least once while on duty." *Id.* at 607 n.1 (citing 48 Fed. Reg. 30,724 (1983)). Furthermore, "5% of workers reported to work 'very drunk' or got 'very drunk' on duty at least once." *Id.* As a result, the Federal Railroad Administration (FRA) established safety standards which required railroad employees to submit to blood and urine tests following certain major train accidents. *Id.* at 608 (citing 49 C.F.R. § 219.203(a) (1987)). In addition, similar tests were authorized to be administered to an employee violating certain safety rules. *Id.* (citing 49 C.F.R. § 219.301(b)(3) (1987)).

62. *Skinner*, 489 U.S. at 619.

63. *Id.* at 628. There is a compelling interest because the employees "subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Id.* FRA regulations state that "[t]oxicological testing is required following a 'major train accident,' which is defined as any train accident that involves (i) a fatality, (ii) the release of hazardous material accompanied by an evacuation or a reportable injury, or (iii) damage to railroad property of \$500,000 or more." *Id.* at 608 (quoting 49 C.F.R. § 219.201(a)(1) (1987)).

Testing is also required after an "impact accident" which is defined as "a collision that results in a reportable injury, or in damage to railroad property of \$50,000 or more." *Id.* (quoting 49 C.F.R. § 219.201(a)(2) (1987)). Finally, testing is required after "any train accident that involves a fatality to any on duty railroad employee." *Id.* (quoting 49 C.F.R. § 219.201(a)(3) (1987)).

64. *Id.* at 627. Congress recognized the "relation between safety and employee fitness" when it enacted the Hours of Service Act in 1907, Baltimore & Ohio

ernment's compelling interests outweighed any privacy concerns implicated by the toxicological testing.⁶⁵

The Supreme Court again addressed the drug-testing issue in *National Treasury Employees Union v. Von Raab*.⁶⁶ Holding that the government was justified in conducting drug-testing, the Court found that the government has a compelling interest in ensuring that the United States Custom Service maintains employees that are "physically fit and have unimpeachable integrity and judgment."⁶⁷ The Court ruled that there is a further compelling interest in preventing Custom Service employees from utilizing deadly force in a reckless manner.⁶⁸ Finally, the Court held that governmental interests in safeguarding the nation's borders and public safety outweigh the privacy expectations of employees responsible for interdicting illegal drugs or their requirement to carry a firearm.⁶⁹

These two cases demonstrate how the Supreme Court has dealt with the constitutionality of suspicionless urinalysis drug-testing. The governmental interest in the testing program must be weighed against the individual's Fourth Amendment interests.⁷⁰ While it is

R. Co. v. I.C.C., 221 U.S. 612, 619 (1911), "and also when it authorized the Secretary to 'test . . . railroad facilities, equipment, rolling stock, operations, or persons, as he deems necessary to carry out the provisions' of the Federal Railroad Safety Act of 1970." *Id.* (citing 45 U.S.C. § 437(a) (1988)).

65. *Id.* at 633.

66. 489 U.S. 656 (1989). This case involved a drug-screening program implemented by the United States Custom Service (USCS) which required urinalysis tests to be conducted upon USCS employees seeking transfer or promotion "to positions having a direct involvement in drug interdiction or requiring the incumbent to carry firearms or to handle 'classified' material." *Id.*

67. *Id.* at 670. It is well established that travelers entering the United States may be stopped and required to submit to a routine search, even though there is no probable cause to believe the traveler is bringing something into or entering the United States illegally. *Id.* (citing *Carroll v. United States*, 267 U.S. 132, 154 (1925)). The governmental interest in self-protection could be irreparably damaged if USCS employees were "unsympathetic to their mission of interdicting narcotics." *Id.* A USCS employee that is also indifferent to the mission of the USCS has the ability to facilitate importation of large drug shipments or block apprehension of dangerous criminals. *Id.*

68. *Id.* at 670-71. Customs employees who may use deadly force plainly "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Id.* at 671. The Court agreed with the government's position that the public should not have to bear the risk "that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force." *Id.*

69. *Id.* at 677. The Court has recognized that "'operational realities of the workplace' may render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts." *Id.* at 671 (quoting *O'Connor v. Ortega*, 480 U.S. 709, 717, 732 (1987) (Scalia, J., concurring)).

70. *Skinner*, 489 U.S. at 619.

helpful to analyze how the Court has applied a balancing test in order to see if such a search is reasonable, the balancing test is fact-specific, applied on a case-by-case basis and determined by the totality of the circumstances.⁷¹

IV. NARRATIVE ANALYSIS

A. The Majority Opinion

In *University of Colorado v. Derdeyn*, the Supreme Court of Colorado focused on the Fourth Amendment implication of this case. The Fourth Amendment is implicated if state action exists and there has been a search.⁷² If the case at hand involves both of these elements, the court must then determine whether the search is reasonable.⁷³

Initially, the court in *Derdeyn* established that the Fourth Amendment applied to CU's random, suspicionless urinalysis drug-testing program. The court stated that "[t]he Fourth Amendment to the United States Constitution protects individuals from unreasonable searches conducted by the government, even when the government acts as the administrator of an athletic program in a state school or university."⁷⁴ In *Derdeyn*, the court found that state action existed,⁷⁵ and the urinalysis conducted by CU was indeed a search because it violated the student athlete's legitimate expectation of privacy.⁷⁶

The court then focused on the reasonableness requirement of the Fourth Amendment. Ultimately, the court concluded that CU's drug-testing program was designed for a special government interest beyond the needs of ordinary law enforcement.⁷⁷ The *Derdeyn*

71. For a brief summary of cases that have decided whether suspicionless urinalysis drug-testing is constitutional using a balancing test, see *supra* notes 59 & 60.

72. For a brief discussion of the Fourth Amendment, see *supra* notes 45-51 and accompanying text.

73. *Id.*

74. *Derdeyn*, 863 P.2d at 935-36 (citing *Von Raab*, 489 U.S. at 665; *Schall*, 864 F.2d 1309; *Brooks*, 730 F. Supp. 759).

75. *Id.* at 930 n.1. ("The parties have agreed that [CU] is a state institution, and that the actions of the individual defendants constitute state action for all purposes relevant to this case.")

76. *Id.* at 936. "[I]t is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, . . . these intrusions must be deemed searches under the Fourth Amendment." *Id.* (quoting *Skinner*, 489 U.S. at 617).

77. For a further discussion of the special government interest, see *supra* note 47 and accompanying text.

court, therefore, used a balancing test similar to that which the Supreme Court applied in both *Skinner* and *Von Raab*.⁷⁸

1. *Balancing Test*

The court balanced the student athlete's privacy interests with CU's governmental interests to determine whether the search was unreasonable under the Fourth Amendment.⁷⁹ The court initially addressed the arguments presented by CU contending that student athletes have a lower expectation of privacy.⁸⁰ The court stated that "it cannot be said that university students, simply because they are university students, are entitled to less protection than other persons under the Fourth Amendment."⁸¹

First, CU argued that its testing procedures were not seriously intrusive because the monitoring was aural, rather than visual.⁸² The court rejected this argument, asserting that aural monitoring is not necessarily less intrusive than visual monitoring.⁸³ The court further noted that CU did not rule out the possibility of returning to visual monitoring.⁸⁴ CU also contended that student athletes have a diminished expectation of privacy because they regularly provide urine samples in annual examinations and require close

78. For a discussion of *Skinner* and *Von Raab*, in which the Supreme Court utilized a balancing test, see *supra* notes 61-71.

79. *Derdeyn*, 863 P.2d at 936 (citing *Skinner*, 489 U.S. at 619). In *Skinner*, the Supreme Court stated that reasonableness "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *Id.*

For a brief discussion of CU's asserted governmental interests, see *infra* note 103 and accompanying text.

80. *Derdeyn*, 863 P.2d at 937.

81. *Id.* at 938 (citing *Morale v. Grigel*, 422 F. Supp. 988, 997, 998 (D.N.H. 1976); *Collier v. Miller*, 414 F. Supp. 1357, 1359, 1367, 1367 n.11 (S.D. Tex. 1976); *Smyth v. Lubbers*, 398 F. Supp. 777, 786 (W.D. Mich. 1975)).

The court found that Fourth Amendment cases involving high school students were not very instructive in deciding *Derdeyn*. *Id.* at 939 (citing *Schaill*, 864 F.2d 1309 (7th Cir. 1988); *In re P.E.A.*, 754 P.2d 382 (Colo. 1988); *Acton v. Vernonia Sch. Dist.* 47J, 796 F. Supp. 1354 (D. Or. 1992)). The court considered cases involving the Fourth Amendment rights of adults in the workplace environment much more instructive. *Id.*

In *Acton*, the court "specifically distinguished the case before it, on factual grounds, from a case such as *Derdeyn*, 832 P.2d 1031, that involved 'college students who have, for the most part, reached the age of adulthood.'" *Derdeyn*, 863 P.2d at 939 n.19 (quoting *Acton*, 796 F. Supp. at 1363 n.7).

82. *Id.* at 939.

83. *Id.* Generally, the court agreed that aural monitoring is less intrusive than visual monitoring. *Id.* A female student's testimony regarding aural monitoring, indicated that such monitoring is still quite intrusive. *Id.* at 939 n.20. When asked how she felt about someone standing outside the room while providing the sample, she stated that it was bothersome and embarrassing. *Id.*

84. *Id.* at 939.

physical contact with the trainers who administer the urinalysis.⁸⁵ The court noted, however, that while the Supreme Court has stated that urinalysis testing is less intrusive in a medical environment,⁸⁶ testimony indicated that CU's drug-testing was not conducted in such an environment.⁸⁷ While random, suspicionless urinalysis drug-testing may be less intrusive for individuals who are required by their jobs to undergo frequent medical examinations,⁸⁸ the court distinguished student athletes and would not classify them as those who must undergo frequent medical examinations.⁸⁹ The court concluded that a student athlete's privacy interests are just as strong as those of ordinary people who undergo annual physical examinations.⁹⁰

CU's next argument in defense of its program is that the student athlete's privacy interests are lowered because he already submits to extensive on- and off-campus regulations.⁹¹ The court rejected this argument since those regulations do not intrude upon the student athletes' privacy interests as extensively as a urinalysis.⁹²

CU further argued that the student athletes' privacy interests are diminished because they must submit to the NCAA's random urinalysis drug-testing as a prerequisite to participation in NCAA athletics.⁹³ The court recognized that the NCAA's requirement

85. *Derdeyn*, 863 P.2d at 939-40.

86. *Id.* at 940 (citing *Skinner*, 489 U.S. at 626).

87. One female student testified that while "the trainers were treating me it was more like I was getting medical treatment." *Id.* at 940 n.21. She stated, however, that in the instance of drug-testing, "it was more like they were a policeman, more like an enforcement type situation and the atmosphere changed from friendly to adversarial." *Id.*

88. See *Dimeo v. Griffin*, 943 F.2d 679, 682 (7th Cir. 1991).

89. *Derdeyn*, 863 P.2d at 940. The court supported its distinction between student athletes and individuals who undergo frequent medical treatment by referring to testimony from one student athlete that stated, "I have never been injured, I have been lucky and so the only time I saw the trainers was for a urinalysis." *Id.*

90. *Id.* The Seventh Circuit suggested that people who undergo medical or other intrusions on a routine basis will be less sensitive to such intrusions. *Dimeo*, 943 F.2d at 682. However, the court in *Derdeyn* believed that people that merely undergo an annual examination do not fit into *Dimeo's* category of "those who must undergo 'frequent' medical examinations." *Derdeyn*, 863 P.2d at 940.

91. *Id.* Some of these regulations included "maintenance of required levels of academic performance, monitoring of course selection, training rules, mandatory practice sessions, diet restrictions, attendance at study halls, curfews, and prohibitions on alcohol and drug use." *Id.*

92. *Id.* at 941.

93. *Id.* CU's athletic director testified that the NCAA conducted random drug-testing of athletes at championship events as well as drug-testing of the top three finishers and certain starting players. *Id.* The record also indicated that the NCAA required the athletes to sign consent forms for such testing. *Id.*

could reduce the intrusiveness of another required test.⁹⁴ The court noted the testimony from the lower court which indicated that a significant part of the intrusion was that friendly relationships with CU trainers turned into “untrusting and confrontational” relationships during drug-testing.⁹⁵ Additionally, CU contended that the consequence of refusing to provide a sample, not being allowed to participate in intercollegiate athletics, is not severe.⁹⁶ The court did reject this argument because many intercollegiate athletes rely on athletic scholarships to fund their education.⁹⁷ The court further concluded that many athletes pursue careers in which it is advantageous to have intercollegiate athletics as a part of an athlete’s background.⁹⁸ The court did recognize that intercollegiate athletics, in and of itself, is a valuable experience,⁹⁹ and therefore ineligibility, according to the court, was a significant detriment.¹⁰⁰

Finally, CU asserted that a student athlete’s expectation of privacy is diminished because positive test results were “confidential and not used for purposes of criminal law enforcement.”¹⁰¹ The court rejected this argument, indicating that CU never provided any specific or general assurance of confidentiality in its written descriptions of the university’s drug-testing program.¹⁰²

After rejecting all of CU’s arguments regarding a student athlete’s lower expectation of privacy, the court addressed the strength of the government interests involved. CU asserted a variety of government interests, including “preparing its athletes for drug testing in NCAA championship events, promoting the integrity of its athletic program, preventing drug use by other students who look to the athletes as role models, ensuring fair competition and protecting the health and safety of intercollegiate athletes.”¹⁰³ The court

94. *Derdeyn*, 863 P.2d at 941.

95. *Id.*

96. *Id.* at 941-42. CU claimed that ineligibility to participate in intercollegiate athletics was not as serious a consequence as loss of employment, “as would be the consequence in some government employee drug-testing cases.” *Id.* at 942.

97. *Id.*

98. *Id.*

99. *Derdeyn*, 863 P.2d at 941-42.

100. *Id.* at 942.

101. *Id.* The court noted that while an intrusion by the government is generally less intrusive when done for purposes other than law enforcement, this fact is already accounted for, as a matter of law, when performing an analysis similar to that of cases such as *Skinner* and *Von Raab*. *Id.* For a further discussion of *Skinner* and *Von Raab*, see *supra* notes 61-71 and accompanying text.

102. *Id.* The court found that students must consent to the release of drug-testing information to a substantial number of people. *Id.*

103. *Id.* at 943.

noted that while many cases uphold random, suspicionless urinalysis drug-testing when there is a compelling governmental interest involved,¹⁰⁴ "the Supreme Court has not held that only a compelling interest will suffice."¹⁰⁵ In fact, the court recognized that other courts have upheld such testing without a compelling government interest.¹⁰⁶ Instead of labeling the government interest as compelling or substantial, the court decided to look at similar cases to see what government interest justified, or did not justify, similar intrusions.¹⁰⁷

The court looked at decisions made by different circuit courts to see how other jurisdictions balanced governmental and individual interests.¹⁰⁸ The court recognized that CU had a significant interest in protecting the health and safety of its intercollegiate athletes.¹⁰⁹ The court, however, found that CU failed to demonstrate that student athletes have a greatly diminished expectation of privacy or that its program is not significantly intrusive.¹¹⁰ The court also noted that although preventing drug use by other students who look to athletes as role models may be a valid public safety concern, CU offered no evidence that CU students view the university athletes as role models.¹¹¹ The court was also skeptical about some of CU's alleged governmental interests and indicated that CU failed to show how these interests were important.¹¹² Ulti-

104. For a discussion of Supreme Court cases that have upheld suspicionless urinalysis drug-testing with a compelling governmental interest, see *supra* notes 61-71.

105. See *Skinner*, 489 U.S. at 624.

106. *Derdeyn*, 863 P.2d at 944 n.28 (citing *Dimeo*, 943 F.2d at 683 (characterizing state's financial interest in horse racing as "substantial" to justify suspicionless urinalysis drug-testing); *International Bhd. of Elec. Workers, Local 1245 v. Skinner*, 913 F.2d 1454, 1462-64 (9th Cir. 1990) (discussing government's "strong" interest in ensuring safety of natural and hazardous liquid pipeline industry through suspicionless urinalysis drug-testing)).

107. *Id.* at 944. The court stated, "rather than trying to characterize CU's interests as 'compelling,' 'strong,' 'substantial,' or of some lesser degree of importance, we think it is more instructive simply to compare them with other types of commonly asserted interests that have been held sufficient or insufficient to justify similar intrusions." *Id.*

108. For a brief summary of some of the cases the *Derdeyn* court reviewed, see *supra* notes 59 & 60.

109. *Derdeyn*, 863 P.2d at 945.

110. *Id.* For a discussion of CU's attempts to show that student athletes had a diminished expectation of privacy or that its drug-testing program was not significantly intrusive, see *supra* notes 82-102 and accompanying text.

111. *Id.* at 945. CU did not present any evidence to indicate that its program, by deterring drug use among athletes, had diminished drug use among the general student population. *Id.*

112. *Id.* at 945-46. The alleged government interests that CU did not explain included the maintenance of the integrity of its athletic program, the promotion

mately, the court decided that the great majority of cases following *Skinner* and *Von Raab* "clearly militate against the conclusion that CU's program is a reasonable exercise of state power under the Fourth Amendment."¹¹³

2. *Validity of Consent*

CU argued that even if random drug-testing was not reasonable under the Fourth Amendment, the university did not violate the Constitution because student athletes voluntarily consented to the testing at the beginning of the year.¹¹⁴ The court recognized that it must defer to the trial court's findings on voluntariness unless its findings were "clearly erroneous."¹¹⁵

The trial court made a factual finding that CU's student athletes did not voluntarily consent to the drug-testing.¹¹⁶ CU emphasized that there was not a factual finding regarding consent, but rather an erroneous legal conclusion improperly based upon the doctrine of unconstitutional conditions.¹¹⁷ The court rejected

of fair competition and the prevention of disqualification of its athletes at sporting events. *Id.*

113. *Id.* at 945. Although the court believed that the government interest alleged was significant, CU's inability to show a diminished expectation of student athlete privacy led the court to decide that the testing was a Fourth Amendment violation. *Id.* The court also held that because the Colorado Constitution provides at least as much protection for unreasonable searches and seizures as does the Fourth Amendment, CU's drug-testing program was also unconstitutional under Article II, Section 7, of the Colorado Constitution. *Id.* at 946.

114. *Derdeyn*, 863 P.2d at 946. The court cited *Schneckloth v. Bustamonte* to demonstrate that "[a] warrantless search of an individual is generally reasonable under the Fourth Amendment if the individual has voluntarily consented to it." 412 U.S. 218, 219, 222 (1973). Thus, if the urinalysis drug-testing was too much of an intrusion, then the athletes' voluntary consent would allow the intrusion under the Fourth Amendment. A voluntary consent to a search is a "consent intelligently and freely given, without any duress, coercion or subtle promises or threats calculated to flaw the free and unconstrained nature of the decision." *Derdeyn*, 863 P.2d at 946 (quoting *People v. Carlson*, 677 P.2d 310, 318 (Colo. 1984)).

115. *Id.* (citing *United States v. Wright*, 932 F.2d 868, 878 (10th Cir. 1991); *United States v. Corral*, 823 F.2d 1389, 1393 (10th Cir. 1987)). The trial court cited *Bustamonte* to establish that the government has the burden to prove the voluntariness of consent. *Id.* (citing *Bustamonte*, 412 U.S. at 248-49).

116. *Derdeyn*, 863 P.2d at 946. The evidence upon which the Supreme Court based its decision regarding voluntariness included testimony from several intercollegiate student athletes who described "how and when they were presented with consent forms to sign, and why they signed them." *Id.* The student athletes indicated that they signed consent forms after the initial team meetings and that such meetings occurred at the beginning of each academic year. *Id.* at 947 n.31. When CU's counsel presented its evidence, it did not offer evidence regarding how or when CU presented the student athletes with consent forms. *Id.* at 946.

117. *Id.* at 947. For a brief discussion of the doctrine of unconstitutional conditions, see *supra* notes 52-53 and accompanying text.

CU's assertion, concluding that the trial court did make a factual finding regarding consent and used the doctrine of unconstitutional conditions as an alternative ground to find that the athletes consented involuntarily.¹¹⁸

The court next determined whether the record supported the trial court's finding that the CU athletes consented involuntarily.¹¹⁹ The record stated that a student may not participate in or receive a scholarship for CU's intercollegiate athletics program absent a signed consent.¹²⁰ The record additionally indicated that CU initially notified the student athletes of the drug-testing program in a general manner, but were later confronted with the specific rules only when it may have been too late to apply to another institution or athletic program.¹²¹ No indication was noted in the record as to whether CU gave its student athletes any assurance that more intrusive drug-testing methods will not be employed.¹²²

After reviewing the record, the Supreme Court of Colorado, in agreement with the trial court, found that "CU failed to bear its burden to prove that consents obtained pursuant to its random, suspicionless urinalysis drug-testing program for the certified class of

118. *Derdeyn*, 863 P.2d at 947. In applying the doctrine of unconstitutional conditions, the trial court stated that even though participation in athletics is a "benefit" and not a "right," consent to a Fourth Amendment search must still be voluntary. *Id.* A "right" is protected by the Constitution, whereas a "benefit" is not. The Supreme Court acknowledged that while the government may deny benefits, "if the government could deny a benefit to a person because of his [exercise of] constitutionally protected [rights], his exercise of those freedoms would in effect be penalized and inhibited." *Id.* (quoting *Perry v. Sinderman*, 408 U.S. 583, 597 (1972)). The trial court applied this reasoning to CU and determined that "no consent can be voluntary where the failure to consent results in a denial of the governmental benefit." *Id.* The trial court concluded that the student athletes did not voluntarily consent because refusing to consent resulted in a denial of participation in athletics, essentially conditioning a governmental benefit. *Id.* at 948. The trial court cited a number of cases to support its position. For a brief discussion of these cases, see *supra* note 52.

119. *Derdeyn*, 863 P.2d at 946-49. The consent of future students was an important issue because these students were a part of the class of plaintiffs who brought the class action. *Id.* at 933 n.9. Although it appears impossible to evaluate the consent of future students, the trial was conducted under the premise that "the procedures for obtaining consents are standard components of the drug-testing program and are uniform." *Id.* at 949. Consistent with this premise, CU made no argument that individualized determinations are required or that consent cannot be properly evaluated as far as prospective students are concerned. *Id.*

120. *Id.* at 949.

121. *Id.*

122. *Id.* The record does not indicate whether prospective student athletes were told that CU may revert back to former procedures or visual monitoring of the collection of urine samples. *Id.*

intercollegiate student athletes were voluntarily given.”¹²³ The court, therefore, found it unnecessary to consider the doctrine of unconstitutional conditions.¹²⁴

B. Chief Justice Rovira's Dissent

Chief Justice Rovira dissented, asserting that the majority misconstrued the trial court's ruling on the voluntariness of the student athletes' consent.¹²⁵ Specifically, Chief Justice Rovira believed the majority incorrectly declined to consider the doctrine of unconstitutional conditions.¹²⁶ He reasoned that the trial court relied upon the doctrine of unconstitutional conditions in deciding the voluntariness of consent.¹²⁷ He concluded that the case could have only been logically decided using the doctrine of unconstitutional conditions.¹²⁸ Chief Justice Rovira disagreed with the majority's ruling that CU failed to establish the voluntary nature of the student athletes' consent.¹²⁹ He observed that the plaintiff class consisted of “both present and prospective student athletes.”¹³⁰ Therefore, Chief Justice Rovira reasoned it was not possible for the trial court to hear any evidence regarding the voluntariness of con-

123. *Id.* The court defined the requirements for voluntary consent as being “freely given, without any duress, coercion or subtle promises or threats calculated to flaw the free and unconstrained nature of the decision.” *Id.* (citing *Carlson*, 667 P.2d at 318).

124. *Derdeyn*, 863 P.2d at 950 n.36. To decide whether consent is given voluntarily, courts have used the totality of the circumstances test, the doctrine of unconstitutional conditions, or both. In *Bostic v. McClendon* and *Feliciano v. City of Cleveland*, the trial courts utilized the totality of the circumstances test of *Bus-tamonte*, finding that the consent of the respective plaintiffs was not voluntary. *Derdeyn*, 863 P.2d at 948 (citing *Feliciano*, 661 F. Supp. at 593-95; *Bostic*, 650 F. Supp. at 249). In *American Fed'n of Gov't Employees v. Weinberger*, the trial court used the totality test to illustrate lack of voluntary consent, as well as the doctrine of unconstitutional conditions for the proposition that consent to drug-testing was not a valid condition of government employment. *Id.* (citing *Weinberger*, 651 F. Supp. at 736). In *Schaill*, the court used only the doctrine of unconstitutional conditions, holding that consent was not valid because it was a condition to participation in interscholastic athletics. *Id.*

125. *Id.* at 951 (Rovira, C.J., dissenting).

126. *Id.* (Rovira, C.J., dissenting).

127. *Derdeyn*, 863 P.2d at 952-53 (Rovira, C.J., dissenting). For a discussion of Chief Justice Rovira's application of the doctrine of unconstitutional conditions, see *infra* note 133 and accompanying text.

128. *Id.*

129. *Id.* at 951 (Rovira, C.J., dissenting). The majority opinion supported the trial court's findings regarding voluntary consent. *Id.* at 949 (Rovira, C.J., dissenting). In doing so, the majority pointed out that it must defer to the trial court's determination of such an issue unless its findings are clearly erroneous. *Id.* at 946 (Rovira, C.J., dissenting) (citing *United States v. Wright*, 932 F.2d 868, 878 (10th Cir. 1991); *United States v. Corral*, 823 F.2d 1389, 1393 (10th Cir. 1987)).

130. *Id.* at 951 n.1 (Rovira, C.J., dissenting).

sent to drug-testing of prospective students because they are not actually in CU's athletic program.¹³¹ According to Chief Justice Rovira's theory, the only evidence which the trial court could have obtained is that which pertained to actual CU student athletes.¹³²

Based on the doctrine of unconstitutional conditions, Chief Justice Rovira concluded that CU's program was constitutional.¹³³ He noted that, with respect to present CU student athletes, the trial court did not apply the totality of the circumstances test properly in determining the voluntariness of consent.¹³⁴ Chief Justice Rovira indicated the impossibility of determining the level of coercion for the entire class of plaintiffs because each individual student athlete will react differently "depending on their circumstances."¹³⁵

C. Justice Erickson's Dissent

Justice Erickson's dissent focused on the balancing test applied in determining whether a suspicionless urinalysis drug-test is reasonable under the circumstances. Justice Erickson believed that CU's interests outweighed the student athletes' privacy concerns.¹³⁶ The Justice asserted three reasons why student athletes have diminished expectations of privacy: (1) student athletes are routinely physically examined; (2) they voluntarily submit to extensive on- and off-campus regulations; and (3) they regularly interact in a communal locker room.¹³⁷ He therefore concluded that the gov-

131. *Id.* at 951 (Rovira, C.J., dissenting).

132. *Derdeyn*, 863 P.2d at 951 (Rovira, C.J., dissenting).

133. *Derdeyn*, 863 P.2d at 957 (Rovira, C.J., dissenting). Chief Justice Rovira stated that in applying the doctrine of unconstitutional conditions, the court should "balance the asserted governmental interest in conditioning the benefit against the individual's interest in not being requested to waive Fourth Amendment rights in order to receive that benefit." *Id.* at 955 (Rovira, C.J., dissenting). In finding that the government interests outweighed the individual's interests, Chief Justice Rovira cited a number of cases in which courts have upheld conditioning governmental benefits which are far less important than the right to participate in intercollegiate athletics. *Id.* at 956 (Rovira, C.J., dissenting) (citing *Snepp v. United States*, 444 U.S. 507 (1980); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *Zap v. United States*, 328 U.S. 624 (1946)).

134. *Id.* at 952 (Rovira, C.J., dissenting). The Supreme Court adopted the totality of the circumstances test in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The test states that the voluntariness of consent is "a question of fact to be determined from all the circumstances." *Bustamonte*, 412 U.S. at 248-49.

135. *Id.* at 952 (Rovira, C.J., dissenting). Chief Justice Rovira illustrated this by differentiating between a student that depended on athletics as a financial resource to afford college and a student that did not need financial assistance. *Id.* (Rovira, C.J., dissenting).

136. *Id.* at 963 (Erickson, J., dissenting).

137. *Derdeyn*, 863 P.2d at 961-62 (Erickson, J., dissenting).

ernmental interests of protecting the health and safety of intercollegiate student athletes and preventing drug use by other students looking to the athletes as role models outweighed the student athletes' expectations of privacy.¹³⁸ Justice Erickson further stated that "the important interests asserted by CU . . . would be placed in jeopardy, and CU's efforts to achieve these goals significantly hampered, if it were required to point to specific facts giving rise to a reasonable suspicion before testing a student athlete."¹³⁹

Justice Erickson also addressed the issue of consent.¹⁴⁰ Justice Erickson agreed with the majority that, as an appellate court, they must "defer to the trial court's findings on the factual issue of voluntariness unless its findings are clearly erroneous or not supported by the record."¹⁴¹ Justice Erickson stated, however, that the trial court decided the issue of voluntary consent as a matter of law, not as a factual matter.¹⁴² Because an appellate court reviews findings of law *de novo*,¹⁴³ Justice Erickson concluded that the majority should have reviewed the voluntariness issue *de novo* instead of unnecessarily deferring to the trial court's findings.¹⁴⁴

Justice Erickson concluded that "suspicionless drug-testing of intercollegiate student athletes is a reasonable search under the Fourth Amendment. . . ."¹⁴⁵ He also indicated that "CU may validly condition student athletes' participation in intercollegiate athletics on a knowing and voluntary consent to the drug-testing program."¹⁴⁶

138. *Id.* at 962 (Erickson, J., dissenting).

139. *Id.* at 963 (Erickson, J., dissenting). Justice Erickson agreed with the trial court that "it is nearly impossible to ever establish reasonable suspicion of drug use among student athletes." *Id.* at 963 (Erickson, J., dissenting) (citing *Von Raab*, 489 U.S. at 668; *Skinner*, 489 U.S. at 624; *Martinez-Fuerte*, 428 U.S. at 557; *Camara v. Municipal Ct. of San Francisco*, 387 U.S. 523, 535-36 (1967)).

140. *Id.* (Erickson, J., dissenting).

141. *Id.* at 964 (Erickson, J., dissenting) (citing *Maj. op.* at 946).

142. *Derdeyn*, 863 P.2d at 964 (Erickson, J., dissenting). Justice Erickson pointed out that "[i]t is clear from a plain reading of the trial court's order that it made no findings of fact regarding the validity of consent given by any individual member of the class." *Id.* (Erickson, J., dissenting). The factual findings that the majority relied upon, according to Justice Erickson, appear in the trial court's order as "conclusions of law." *Id.* (Erickson, J., dissenting). Furthermore, Justice Erickson stated that the trial court relied on the doctrine of unconstitutional conditions "to conclude as a matter of law that no student athlete could validly consent to a drug-testing program." *Id.* (Erickson, J., dissenting).

143. *Id.* (Erickson, J., dissenting).

144. *Derdeyn*, 863 P.2d at 965 (Erickson, J., dissenting).

145. *Id.* at 967 (Erickson, J., dissenting).

146. *Id.* (Erickson, J., dissenting). Justice Erickson stated that consent to random drug-testing is not per se invalid merely because it is a condition for participating in intercollegiate athletics. *Id.* (Erickson, J., dissenting). A student athlete

V. CRITICAL ANALYSIS

Although the majority opinion in *University of Colorado v. Derdeyn* suggested the need to implement a balancing test in order to determine whether random, suspicionless urinalysis drug-testing is constitutional, the majority did not provide a standard indicating the extent to which the governmental interests must outweigh individual privacy concerns. The majority nevertheless determined that the governmental interests in conducting random, suspicionless urinalysis drug-testing did not outweigh the student athletes' privacy concerns.¹⁴⁷ The court looked at cases with a "compelling" governmental interest,¹⁴⁸ and then examined cases where the governmental interest was deemed "strong" or "substantial."¹⁴⁹ The court, however, refused to characterize the governmental interest which must be demonstrated and instead, focused upon other cases "with other types of commonly asserted interests that have been held sufficient or insufficient to justify similar intrusions."¹⁵⁰

The majority compared the governmental interest CU asserted with a variety of governmental interests arising from numerous other fact patterns.¹⁵¹ None of the cases which the court used for comparison, however, involved random, suspicionless urinalysis drug-testing of university student athletes.¹⁵² Thus, the comparisons employed by the court do not help in resolving the *Derdeyn* case. Regardless, the court determined that the student athletes' privacy interests outweighed CU's interests.¹⁵³ The majority failed to provide any sort of test or standard to help courts resolve similar issues in future cases.

Many of the cases which the majority focused upon involved the need for random, suspicionless urinalysis drug-testing to avoid the risk of injury to others.¹⁵⁴ Instead of giving adequate considera-

can either withhold consent to such a program or choose another college or university with a drug-testing program which is more acceptable to that student athlete. *Id.* (Erickson, J., dissenting).

147. *Id.* at 945.

148. For a discussion of two Supreme Court cases in which the government interest was deemed "compelling," see *supra* notes 61-71.

149. For a brief discussion of cases in which the government interest was "strong" or "substantial," see *supra* note 106.

150. *Derdeyn*, 863 P.2d at 944. For a brief summary of cases that have decided whether suspicionless urinalysis drug-testing is constitutional using a balancing test, see *supra* notes 59 & 60.

151. *Id.*

152. See *supra* notes 61-71, 106 and accompanying text.

153. *Derdeyn*, 863 P.2d at 946.

154. For a brief discussion of cases in which the court analyzes the significance of the government interest alleged, see *supra* notes 59-71 & 106.

tion to the possible risk of injury to others, the court merely listed some of CU's asserted interests in drug-testing.¹⁵⁵ The court ultimately should have discussed the potential risks of injury to others.¹⁵⁶ By not recognizing the full extent of the governmental interest in public safety, the majority improperly balanced the governmental interests against the student athletes' privacy concerns.

The majority improperly categorized the consents given by the CU student athletes as involuntary.¹⁵⁷ The plaintiff class in this case consisted of "both present and prospective student athletes."¹⁵⁸ It was therefore impossible to obtain any evidence from future student athletes regarding the voluntariness of consent to random drug-testing because future student athletes are not yet in the program and, subsequently, have not yet been asked to give consent.¹⁵⁹ The only evidence which could have been obtained was that of actual student athletes.¹⁶⁰ Chief Justice Rovira further pointed out that the voluntariness of consent varies according to the student athlete.¹⁶¹ While some consents may be voluntary, it is impossible to determine the voluntariness of consent of the entire class of plaintiffs.

Because it was impossible to determine whether the entire class of plaintiffs voluntarily consented to urinalysis drug-testing, the trial court should have relied upon the doctrine of unconstitutional conditions.¹⁶² The doctrine would have produced the only legal find-

155. See *Derdeyn*, 863 P.2d at 943. Some of CU's listed interests included "preparing its athletes for drug testing in NCAA championship events, promoting the integrity of its athletic program, preventing drug use by other students who look to athletes as role models, ensuring fair competition, and protecting the health and safety of intercollegiate athletes." *Id.*

156. "Drug use which leads to increased aggression constitutes a grave physical threat to teammates and competitors." Knapp, *supra* note 10, at 113. In addition, the seriousness of drug abuse among athletes deserves attention because it leads to greater health risks than non-athletic drug abuse. *Id.* at 107.

157. *Derdeyn*, 863 P.2d at 949.

158. *Id.* at 951 n.1 (Rovira, C.J., dissenting).

159. *Id.* at 951-52 (Rovira, C.J., dissenting).

160. *Id.* at 951 (Rovira, C.J., dissenting).

161. *Id.* at 952 (Rovira, C.J., dissenting). Different student athletes are in different situations. Some experience financial strain and come under pressure to consent to the drug testing in order to preserve their scholarship. *Id.* Others may not be under financial pressure, but may still consent to the testing, in which case, the consent is voluntary. *Id.* A heavily recruited student athlete typically does not feel as much pressure since he/she can always participate in athletics elsewhere. See *id.* (Rovira, C.J., dissenting).

162. *Derdeyn*, 863 P.2d at 952 (Rovira, C.J., dissenting). For a discussion of the doctrine of unconstitutional conditions, see *supra* notes 52 & 53 and accompanying text.

ing applicable to both present and future CU students.¹⁶³ The majority, therefore, should have applied the doctrine of unconstitutional conditions to analyze the voluntariness of the student athletes' consent.¹⁶⁴

VI. IMPACT

The *Derdeyn* holding will seriously affect Colorado state universities that implement drug-testing programs. Although the Supreme Court of Colorado found CU's program unconstitutional, it failed to provide Colorado state universities with the guidance necessary to draft a constitutional drug-testing program. The drug-testing procedures at issue in *Derdeyn* include CU's "random drug testing programs, past, present and future."¹⁶⁵ Thus, if drug-testing is conducted according to CU's program to the date of the trial or in a manner "substantially similar" to any of the programs CU used, then the drug-testing will be held unconstitutional.¹⁶⁶

It is difficult, however, to determine exactly what "substantially similar" means. As a result of the *Derdeyn* decision, a Colorado state university does not know how to create a constitutional program, or how to make an existing program constitutional.¹⁶⁷ The result is

163. *Id.* at 952 (Rovira, C.J., dissenting). In applying the doctrine of unconstitutional conditions, the Supreme Court has "consistently applied a balancing test to determine what conditions on the receipt of a governmental benefit are permissible and what conditions are not." *Id.* at 955 (Rovira, C.J., dissenting). The test used balances the governmental interest against the interest of the recipient of a governmental benefit to determine whether the condition is constitutionally permissible. *Id.* (Rovira, C.J., dissenting).

Chief Justice Rovira indicated that student athletes' interests are small compared to other things which the government properly conditioned. *Id.* at 956 (Rovira, C.J., dissenting); see *Snepp*, 444 U.S. 507 (describing employment with CIA); *United States Civil Serv. Comm'n*, 413 U.S. 548 (describing government employment); *Zap*, 328 U.S. 624 (describing government contracts). Chief Justice Rovira decided that the government interest outweighed the student athletes' interest. *Id.* at 957 (Rovira, C.J., dissenting).

164. The majority stated that "it is unnecessary and inappropriate for us to consider whether the trial court reached a legally correct result under the doctrine of unconstitutional conditions." *Derdeyn*, 863 P.2d at 929.

165. *Id.* at 933. This essentially means that all of the variations which have been adopted up to the point of the trial are being contested. For a brief description of the various amendments to the program, see *supra* notes 23-39 and accompanying text. All of the variations were contested because the defendants "have refused to agree that they will not return to the policy which was initially challenged in this class action." *Derdeyn*, 863 P.2d at 933.

166. *Id.* at 946.

167. There are a number of pre-testing guidelines which may be helpful in devising a constitutional program. To properly notify student athletes of the drug-testing procedures, the institution should publish a drug-testing manual. Knapp, *supra* note 10, at 135-36 (citing National Collegiate Athletic Association, 1989 *Drug-Education and Drug-Testing Survey* (1989)). The student athletes should be required

that Colorado state universities' athletic departments will act cautiously when creating their own drug-testing policies and procedures and when altering an existing program.¹⁶⁸ This confusion and uncertainty regarding the law will ultimately hamper Colorado state universities' attempts at pursuing valid governmental interests, such as those asserted by CU.¹⁶⁹

Because the Supreme Court of Colorado did not establish a test to determine whether a drug-testing program is constitutional, more litigation is likely to ensue. Student athletes in Colorado will begin to question their schools' drug-testing programs. Ultimately, it will be up to the courts to guide university athletic departments in creating drug-testing programs that will accomplish governmental goals without infringing upon the student athletes' privacy interests.

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to sign a consent form, indicating proper notification of the testing policy and procedures, rather than effectuating a waiver of constitutional rights. *Id.* at 136.

To ensure accuracy and integrity of a drug-testing program, "[c]ommon precautionary steps include sealed specimens, tamper-proof and properly maintained testing apparatus, a reliable off-site laboratory, an established protocol documenting the chain of custody, storage of all specimens, and confirming testing." *Id.* (citing Rovere, et al., *Drug Testing in a University Athletic Program: Protocol and Implementation*, *The Physician and Sportsmedicine*, at 73-74 (Apr. 1986)). Instead of using visual monitoring, integrity can be maintained through aural monitoring, dye in the toilet bowl and testing the temperature of the sample. Knapp, *supra* note 10, at 136-37 (citing Zirkel, *Drug Testing Brings Fallout in Tippecanoe*, *PHI DELTA KAPPAN*, at 171, Oct. 1988).

168. Various cases contain dicta indicating drug-testing procedures that would tend to increase the likelihood of a program being deemed unconstitutional. For example, direct observation of sample collection may be too invasive of an athlete's privacy expectations. Knapp, *supra* note 10, at 135 (citing *Von Raab*, 489 U.S. at 672 n.2; *Skinner*, 489 U.S. at 626; *Schail*, 864 F.2d at 1318; Council on Scientific Affairs, *Issues in Employee Drug Testing*, 258 J.A.M.A. 2089, 2090 (Oct. 16, 1987)).

Performing drug-testing in the off-season may be a further indication that the program is overbroad. Knapp, *supra* note 10, at 135 (citing *Bunger v. Iowa High Sch. Athletic Ass'n*, 197 N.W.2d 555 (Iowa 1972)).

169. For a brief discussion of the governmental interests asserted by CU, see *supra* note 103 and accompanying text.

